314 U.S. 668
(12)
FILED
SEP 3 1941
CHARLES ELMORE CROPLEY
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# Supreme Court of the United States

October Term 1941

No. 580

FORD MOTOR COMPANY,

*Petitioner,*

*vs.*

FEDERAL TRADE COMMISSION,

*Respondent.*

## Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit and Brief in Support Thereof

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# Supreme Court of the United States

**October Term 1941**

No. .....

FORD MOTOR COMPANY,

*Petitioner,*

*vs.*

FEDERAL TRADE COMMISSION,

*Respondent.*

## Petition for Writ of Certiorari

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

The above named petitioner prays that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Sixth Circuit entered June 5, 1941, affirming an order of the Federal Trade Commission directing petitioner to cease and desist from using a certain alleged unfair method of competition in interstate commerce.

### OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 404) was filed June 5, 1941, and is printed in 120 F (2d) 175.

## BASIS OF JURISDICTION

Jurisdiction is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 5 of the Federal Trade Commission Act, as amended, U.S.C.A. Title 15, Section 45.

The decree of the Circuit Court of Appeals was entered June 5th, 1941 (R. 403).

A petition for rehearing (R. 419) was denied by the Circuit Court of Appeals on June 25, 1941 (R. 433) without opinion.

## SUMMARY STATEMENT

The Federal Trade Commission, under date of December 1, 1936, filed a complaint against petitioner, Ford Motor Company (and a certain finance company as to which the complaint was dismissed prior to the hearing before the Commission), charging that the petitioner was engaged in unfair methods of competition in interstate commerce, contrary to Section 5 of the Federal Trade Commission Act, in that it was causing advertising matter to be circulated to the effect that under the Universal Credit Company's Authorized Ford Finance Plan a new Ford car could be purchased at $25.00 a month with "financing at ½ of 1% a month, or 6% for 12 months" (R. 29). The complaint charges that this advertising was deceptive to prospective purchasers of motor vehicles on the ground that such purchasers supposed the plan to refer to 6% simple interest on declining balances, as reduced from time to time by the monthly payments. Petitioner's answer denied the material allegations of the complaint (R. 33, 41). The method of calculating the finance charge under the plan referred to is to add to

the balance to be financed an amount equal to ½ of 1% thereof for each month during which the contract, by its terms, is to continue, and this total sum is divided by the number of months during which the deferred payments are to be made, the quotient being the amount of each installment so payable (R. 35, 108, 109).

The following facts are undisputed in the record:

The Ford Motor Company ships its automobiles from its factory in Dearborn, Michigan, to various dealers located throughout the United States. It sells its cars outright to these dealers. By the time a car has reached the dealer, the Ford Motor Company has been paid in full and has no further right, title, or interest in or to the car (R. 95-99).

**The financing plan, the advertising of which is complained of by the Commission, relates solely to the financing of time payments on retail purchases of such automobiles by members of the public from the dealers. It has nothing whatever to do with the sale of automobiles by the Ford Motor Company to such dealers or to any one else** (R. 103).

**There is no evidence in this record of any such retail sales being made in *interstate* commerce by any such dealer, but the contrary is obviously the fact—that all sales by dealers to members of the public are in *intrastate* commerce.**

**The Financing Plan contained no reference to "interest."** The financing plan is identical in principle with the plan used by the Federal Housing Administration in its Modernization Credit Plan under Title I of the National Housing Act (Respondent's* Exhibits 7 and 8, R. 327-8), and is identical in principle with the plan used by the Electric Home and Farm Authority organized pur-

*Respondent's Exhibit—"Respondent" is used here to designate Ford Motor Company, which was Respondent in the proceedings before the Commission.

suant to an act of Congress for financing domestic electric appliances (Respondent's Exhibit 9, R. 328-9). Both of these federal institutions in their circulars describe the finance charge which is arrived at in the same way as the charge under the finance plan involved here, as being "interest" or "discount" (Respondent's Exhibits 7 and 9).

Small loan departments of banks also follow an identical practice in regard to small loans except that they (unlike the petitioner in its advertising) refer to the finance charge as "interest" (R. 289, 332, 336).

Practically all the advertisements of the plan shown by the record to have been published either by the Ford Motor Company or by dealers in Ford cars, or by the finance company, contain either an adequate explanation from which any one interested in doing so might easily determine the exact working of the plan and the actual amount of the financing charge, or definite advice to the purchaser to see or consult a Ford dealer concerning the plan. (See exhibits*).

**There is no evidence in the record that a single one of the fifteen so-called "public" witnesses who testified was deceived into the purchase of an automobile, or even induced to enter into negotiations for the purchase thereof by any advertisement of the finance plan, whether published by this petitioner or by any other automobile or finance company, and there is no evidence that any of said witnesses was influenced by the plan at all, or even interested therein. The evidence shows that if such witnesses had been interested in the operation of the plan they would have asked a dealer for the details thereof** (R. 276 and 278; 306; 309; 318; 333; 337 and 338; 350; 371; 378).

*(It was stipulated by the parties, R. 24, that all of the exhibits be considered and treated as physical exhibits and are therefore not reproduced in the printed record. These exhibits as certified to this court are in two separate volumes.)

Testimony elicited by the Commission's counsel, upon insistence that some of such witnesses give their offhand impression as to what the percentage phrase itself might convey to them upon a casual glance at the advertisement, goes no further than to result in a substantially evenly divided expression of opinion as between those that surmised that it referred to simple annual interest upon declining balances (R. 229; 245-6; 262-3; 302; 348; 374) and those who supposed it to refer to exactly what the plan called for, namely a financing charge of a certain percentage of the original unpaid balance without diminution resulting from payment in instalments (R. 285, 327, 334-5, 342, 356, 367).

The financing plan, the advertising of which is here complained of, was first announced by the General Motors Acceptance Corporation on October 21, 1935 (Respondent's Exhibit 1, R. 115). The adoption of same was announced by the Ford Motor Company early in January, 1936 (Commission's Exhibit 1), and by other motor car companies in the interim. The uncontradicted evidence in the record shows that the finance charges in the retail sale of motor vehicles prior to the advent of this plan were considerably higher than those called for by this new plan (R. 143, 212, 288, 289, 385, 391).

There is no evidence in the record that any automobile manufacturer, or any dealer, or any finance company, either approved, adopted, or used, any particular form or kind of advertising of such finance plan, or found it necessary or advisable so to do, in order to meet competition. On the contrary, the record uniformly establishes that the various *manufacturing* companies that adopted or approved the use of such plan following its original announcement, did so *to meet the competition created by the beneficial features of the plan itself*, in-

cluding the fact that it offered a simple method of computing time payment charges, prevented dealers from packing or adding arbitrary charges, and because it materially lowered the theretofore existing cost of financing time payments on automobile purchases, and because retail purchasers were requesting dealers for something equally as good (R. 104, 105, 121, 131, 132, 141, 142, 144, 148, 150, 155, 158, 161, 167, 183); and that the various *finance* companies met the plan as a matter of competition *because the terms offered by it were lower than the financing rates then offered by those companies* (R. 143, 144, 196, 213, 362, 385, 391).

## QUESTIONS PRESENTED BY THIS PETITION

The questions presented are:

(1) Is the method complained of, that is the advertising of the finance plan, a method of competition in interstate commerce?

(2) Is the method complained of unfair?

(3) Is the form of the order proper?

## REASONS RELIED UPON FOR ALLOWANCE OF WRIT

(1) The United States Circuit Court of Appeals, Sixth Circuit, has decided an important question of federal law which has never been, but should be, settled by this court.

(2) The United States Circuit Court of Appeals, Sixth Circuit, has decided certain federal questions in a way probably in conflict with applicable decisions of this court:

(a) In respect to the jurisdiction of the Federal Trade Commission over alleged unfair methods of competition in intrastate commerce (Federal Trade Commission v. Bunte Bros. Inc. (decided February 17th, 1941) 61 Sup. Ct. Rep. 580);

(b) In determining that certain alleged practices are unfair;

(c) In affirming an order to cease and desist so general in terms that it varies from the issues in the complaint, and prohibits the doing of the obviously proper. (*Federal Trade Commission v. Gratz,* 253 U. S. 421, 40 S. Ct. 572; *Wrisley Company v. Federal Trade Commission,* 113 Fed. 2d 437, at 442.)

Wherefore it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Court of Appeals should be granted.

Dated August 28, 1941.

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## Brief in Support of Petition for Writ of Certiorari

### I. THE METHOD COMPLAINED OF, THAT IS THE ADVERTISING OF THE FINANCE PLAN, IS NOT A METHOD OF COMPETITION IN INTERSTATE COMMERCE.

Section 5 of the Federal Trade Commission Act, as in effect during the period when the acts complained of took place, provides as follows:

> "Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition **in commerce,** and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership or corporation a complaint stating its charges in that respect * * *."

By definition in the act, of course, the words "in commerce" mean as applicable to this case, "interstate commerce".

(a) The *plan* of financing described above is not, and could not be, the subject of complaint by the Commission. It is the method of *advertising* that is complained of. **The plan itself and the advertisement thereof relate solely to the financing of retail sales by automobile dealers in *intrastate* commerce.** No claim is made by the Commission that the plan, or the advertising thereof, has anything to do with the financing of sales made by Ford Motor Company in interstate commerce.

The Supreme Court in *Federal Trade Commission v. Bunte Bros. Inc.*, 61 Sup. Ct. Rep. 580 (decided

February 17th, 1941) decided that "an unfair method of competition" where employed wholly in *intrastate* commerce was beyond the jurisdiction of the Federal Trade Commission to regulate, regardless of the extent to which it *affected* competition in interstate commerce. The court points out the distinction between such a statute as we are concerned with here, where the methods used must be *in* interstate commerce, and such statutes as the National Labor Relations Act, which may permit regulation of local activities if they *affect* interstate commerce.

It may be urged in answer to the foregoing that in the *Bunte case* the manufacturer itself only shipped *intra-state* and that in such cases as *Federal Trade Commission v. Keppel & Bro.*, 291 U. S. 304, 54 Sup. Ct. 423, where the manufacturer shipped interstate, the Commission was given jurisdiction; and that the present case is distinguishable from the *Bunte case* on the ground that Ford Motor Company is engaged in competition in interstate commerce as against other manufacturers that ship interstate to their own dealers. The answer to this, however, is that in such cases as the *Keppel case* the unfair method of competition (consisting of the shipment of so-called "break and take" packages) was actually used *in* the interstate transaction or shipment. In our case the alleged unfair method of competition, namely the advertising, does not enter into the interstate transaction, that is the shipment of cars by Ford to the dealers, at all.

The financing, and the advertising thereof, relates *solely to intrastate sales* by dealers who have taken title to the automobiles, and in respect to sales

which take place after the interstate commerce in the cars has wholly and definitely terminated. **It is obvious from the decision in the *Bunte case* supra that if a Ford dealer, thus selling intrastate, made a false representation to a prospective purchaser of a car, the Federal Trade Commission would have no jurisdiction to enter any cease and desist order against him. The use by Ford Motor Company itself of an *alleged* unfair method in promotion of such *intrastate* sale could not convert that which would be essentially a method of competition in *intrastate* commerce into a method of competition in *interstate* commerce; and this is true notwithstanding that that practice might have some *effect* upon the competition in interstate commerce existing between Ford Motor Company and other manufacturers of automobiles. In other words, it might then *affect interstate commerce* but it would not be a method of competition *in interstate commerce*. This, to our mind, is the rationale of the *Bunte case*.**

The opinion of the Circuit Court of Appeals clearly shows that that court thought it sufficient if the methods complained of *affected* interstate commerce. It states that petitioner urged "that the method of petitioner does not affect competition in interstate commerce". This is not a correct statement of the question as presented in the court below. Petitioner's brief there stated the proposition as follows: "The methods complained of are not methods of competition in interstate commerce". The opinion below says:

> "All of those things which stimulate or decrease the flow of commerce, although not directly in its stream, are essential adjuncts thereto, and the Congress has power to confer on the Federal Trade Commission their regulation".

And, again, it states:

> "The sale on credit of petitioner's cars by its local dealers, when separately considered, may be intrastate in character but when the activities of petitioner's local agencies are weighed in the light of their relationship to the petitioner, and its financing sales of cars, it is at once apparent that there is such a close and substantial relationship to interstate commerce that the control of such activities is appropriate to its protection."

We respectfully submit that this is wholly beside the point. As the Supreme Court said in the *Bunte case, supra*:

> "This case presents the narrow question of what Congress did, not what it could do. And we merely hold that to read 'unfair methods of competition in (interstate) commerce' as though it meant 'unfair methods of competition in any way affecting interstate commerce', requires, in view of all the relevant considerations, much clearer manifestation of intention than Congress has furnished."

Here, it is not even shown that the method complained of *directly* affects interstate commerce in any way, and there would therefore be no jurisdiction even under acts of Congress permitting regulations of local activities affecting interstate commerce:

*Anderson v. United States*, 171 U. S. 604, 615, 19 Sup. Ct. 50 (at page 54);

*Schecter Poultry Corporation v. United States*, 295 U. S. 495, 55 Sup. Ct. 837.

However, even if it did affect such interstate commerce *directly*, it is clear from the foregoing that the Federal Trade Commission has no jurisdiction, because the method complained of is not *in* interstate commerce.

(b) There is no showing in the record that the method complained of has any injurious tendency to affect the business of Ford Motor Company's competitors. There is no evidence that any automobile manufacturer or any finance company felt it necessary to adopt any particular form of *advertising* in order to meet competition either of Ford Motor Company or any other company which had adopted this plan. *It is clear that it was not the method of advertising that affected any competitor, but that it was the plan itself.* The rates offered by the new plan were lower than those offered by any other plan then in existence and other companies were obliged to adopt the plan for that reason and on account of other meritorious elements of the plan itself. The testimony is uniform in this respect. We submit that for this reason it is not shown that the alleged method affected competition in such a manner as to give the Federal Trade Commission any jurisdiction within the rule laid down in *Federal Trade Commission v. Raladam Company*,* 283 U. S. 643, 51 Sup. Ct. 587 (1931).

*On March 21, 1938, a year and four months after the complaint in this case was filed, the Federal Trade Commission Act was amended (52 Stat. 111, Chap. 49) to include a prohibition against "unfair or deceptive practices in commerce" in addition to the former prohibition against "any unfair method of competition". This amendment cannot affect the rights of petitioner, for it affirmatively appears that no advertising of the character referred to has been used by petitioner since some months prior to the filing of the complaint, and in any event the present complaint was brought under the act prior to the amendment referred to.

## II. THE METHODS COMPLAINED OF ARE NOT UNFAIR.

The advertising used by petitioner was literally true. Furthermore, the public was either given the exact working of the plan in the advertisements or was invited to consult dealers respecting the operation of same. The calculation was simple. The testimony of the witnesses produced by the Commission demonstrates that such witnesses had no difficulty in making the calculations involved, and thoroughly understood the difference between the operation of this plan and the charging of 6% simple annual interest upon declining balances. There was nothing secret or concealed about the operation of this financing plan. It did not involve any constituent of the goods sold, for the character of which the purchaser must rely upon statements made by the seller. The amount charged for financing and the exact character thereof was open and clear to anyone entering into a transaction involving this plan. The testimony of Commission's witnesses clearly demonstrates this if it needs any demonstration.

The fallacy of the Commission is in assuming that a percentage figure can refer only to simple interest upon declining balances. No reference was made to "interest" in the advertising. Even if the word "interest" had been used, the same would have been entirely consistent with ordinary practice as demonstrated by this record. Federal Housing Administration and the Federal Electric Home and Farm Authority, both organized pursuant to authority of Congress, in connection with financing of certain of their public activities use plans identical in principle with that used by petitioner, and actually advertise the financing charge as "interest". Small loan departments of banks do the same thing. It is ordinary

practice. The undisputed testimony in the record, by Commission's own witnesses, fully demonstrates this.

The record also fully demonstrates, out of the mouths of Commission's own witnesses, that no purchaser was actually deceived in any way, or even relied upon any of the company's advertisements of the 6% plan in purchasing an automobile. Only three of the Commission's witnesses bought any automobile on any deferred payment plan during the period during which the 6% plan was being advertised. The advertising of the plan had nothing to do with the purchase by any of the three.

Counsel for the Commission insisted upon attempting to elicit from each of these witnesses for the Commission, in spite of their lack of interest in or reliance upon the plan, his or her casual impression as to what the phrase "6%", lifted bodily out of the advertisement, would mean to such witness. The result was substantially an evenly divided expression of opinion as between those who thought that it might refer to simple interest upon declining balances and those who supposed it to mean exactly what the plan in fact called for. This is far, however, from indicating that any of the witnesses was deceived. It was merely asking a witness to speculate in advance as to whether the percentage symbol referred to simple interest on declining balances or to a financing charge of 6% of the original balance.

Every witness who was asked stated that if he were interested in buying a car on time payments he would have inquired of the dealer for details pertaining to same, and the only witness who did inquire received a full explanation and thoroughly understood the plan before he purchased.

## III. THE FORM OF THE ORDER IS INDEFENSIBLE.

This question really involves more than the mere form of the order. The fact is that the order directs petitioner to cease and desist from doing things that are not only obviously perfectly legitimate but the doing of which is not complained of in the complaint filed by the Commission. This complaint relates solely to the method of *advertising*. The order of the Commission (affirmed in toto by the Circuit Court of Appeals) says nothing about advertising but orders that Ford Motor Company

> "in connection with the offering for sale, sale and distribution of motor vehicles in interstate commerce or in the District of Columbia, do forthwith cease and desist from:
>
> Using the word 'six per cent' or the figure and symbol '6%', or any other words, figures or symbols indicating percentage, in connection with the cost of, or the additional charge for, the use of a deferred or installment payment plan of purchasing motor vehicles, when the amount of such cost or charge collected from, or to be paid by, the purchaser of a motor vehicle under such plan is in excess of simple interest at the rate of 6% per annum, or at the rate indicated by such words, figures or symbols, calculated on the basis of the unpaid balance due as diminished after crediting installments as paid;
>
> Acting concertedly or in cooperation with any company, firm or individual, or with any of its agents or dealers, in a way calculated to further the sale of motor vehicles through use of the methods referred to in paragraph (1) of this order."

As this order now stands it practically amounts to a prohibition of the *use of the plan itself*, a matter which

has never been complained of by the Commission. The record shows (R. 55-56) that other companies that entered into stipulations in regard to the advertising complained of were permitted to advertise the plan under the expression "6%" provided they used explanatory language. In the present order not only does the Commission refuse to permit Ford Motor to use the expression at all in advertising the plan, but it prohibits it from any use whatsoever, without limiting its denial thereof to use by petitioner in *advertising,* which was the matter complained of.

As the order to cease and desist is not limited to the matter charged in the complaint it is improvident and should be annulled:

> *Federal Trade Commission v. Gratz,* 253 U. S. 421, 40 Sup. Ct. 572;
>
> *Wrisley Company v. Federal Trade Commission,* 113 Fed. 2d 437, at 442.

## THE GENERAL MOTORS CASE.

Under date of August 12th, 1940, the Circuit Court of Appeals for the Second Circuit in the case of *General Motors Corporation et al. v. Federal Trade Commission* (114 Fed. 2d 33) sustained the entry by the Commission of a cease and desist order against General Motors Corporation and certain subsidiaries substantially identical with the cease and desist order of which petitioner is here complaining. The application of General Motors for a writ of certiorari in that case was denied by the Supreme Court on the 20th day of January, 1941 (61 Sup. Ct. 550).

"The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times":

*United States v. Comer*, 260 U. S. 482, 43 Sup. Ct. 181;

*Atlantic Coast Line R. Company v. Powe*, 283 U. S. 401, 51 Sup. Ct. 498.

As petitioner pointed out in its reply brief in the Circuit Court of Appeals, the presentation of the *General Motors case* in the Circuit Court of Appeals for the Second Circuit differed substantially from the presentation of petitioner's case in the Sixth Circuit Court of Appeals. The same is true with respect to its application for writ of certiorari to the Supreme Court. This can be made clear by a reference to the briefs and records in the *General Motors case* and is also demonstrated by the fact that in the petition of General Motors Corporation et al. to the Supreme Court for a writ of certiorari (see page 2 of said petition) the only questions presented were the following:

> "Does the power of the Federal Trade Commission to regulate unfair methods of competition in commerce extend to advertising of a corporation not engaged in commerce, by reason of the fact that its capital stock is owned by another corporation engaged in commerce in a different activity?
>
> "Does the Federal Trade Commission's power of regulation for the protection of the unwary, trusting or ignorant against statements which are false extend to statements which are true as well as reasonably informative?"

In other words, on the matter of jurisdiction the G. M. confines itself to the question of its responsibility for

the acts of G.M.A.C. That this was treated as the only question raised in the matter of jurisdiction in respect to interstate commerce is also shown in the opinion of the Circuit Court of Appeals, which devotes only one paragraph, the final paragraph of its opinion, to this phase of the case and dismisses the contention made by G. M. upon the basis of *Federal Trade Commission v. Educational Society*, 302 U. S. 112, and *National Harness Manufacturers Association v. Federal Trade Commission*, 268 Fed. 705. The *Educational Society case* involved an attempt by one corporation to evade a cease and desist order by organizing another. A reading of the opinion in that case will show that the sales were clearly in interstate commerce and involved representations or unfair practices in that commerce. The decision has nothing to do with the issue raised by us in the instant case. A similar question was involved in the National Harness Manufacturers Association, that is as to whether a corporation could escape restraint by employing a medium in the form of an unincorporated voluntary association. The question we are concerned with does not appear to have been involved.

G. M.'s contention that no unfair method was involved appears from its brief in the Second Circuit (Page 27 et seq. thereof) to have been based almost solely upon showing that in its initial advertisement of the plan and some subsequent advertisements it explained the plan in detail and that the testimony shows this was understood by the members of the public. The argument almost wholly ignores the other advertisements referring in brief phrase to the "6% Plan". As we think we have shown in our brief, the use of this title is in no way misleading, but the brief in the *G. M. case* fails to develop this argument and relies, as stated above, largely upon the explanation in certain of the advertisements. That this is

a fair inference as to the restricted character of G. M.'s argument is indicated in the opinion of the Circuit Court of Appeals of the Second Circuit, wherein the court takes care to point out that there was a body of advertising matter on billboards and window posters not containing the explanation in some of the other advertisements and so much relied upon by G. M. in its argument. A similar deficiency of argument is indicated in the petition for writ of certiorari and was promptly seized upon in the brief filed for the Federal Trade Commission in opposition to this writ, where it was pointed out by the Commission that much of the advertising was without any explanatory statement. It is difficult of course to see why the Second Circuit Court of Appeals in any event would find the explanatory advertisements deceptive or unfair, and we believe such finding is demonstrably an error on the part of that court. The situation may be summarized we think by stating that so much emphasis was placed by G. M. on the explanatory advertisements that the court assumed in the absence of illuminating argument that reference to a 6% plan as a title merely, was in some manner deceptive, and that as the bulk of the advertising was of this character it did not take the pains to distinguish between the two in affirming the order of the Commission in its totality.

No exhibits were introduced in the *G. M. case* such as respondent's Exhibits 7, 8 and 9 in the instant case, showing that Governmental instrumentalities such as Federal Housing Administration and Electric Home and Farm Authority engage in practices identical with those complained of by the Commission here, and even in their presentation of same to the public designate the financing charge as "interest", which petitioner has not done. Nor have we been able to find in the *G. M. case* evidence similar to that in the instant case relative to similar

practices on the part of banks in various localities. The argument presented by us in this case (and supported by the exhibits relating to F. H. A. and others and by testimony relative to practice of banks, and also supported by a number of Commission's own witnesses), that even if the percentage be regarded as referring to interest, the latter is a generic term and does not necessarily have the restricted meaning attributed to it by the Commission, was not advanced in the *G. M. case.*

## CONCLUSION.

Each of the foregoing propositions was presented to the Sixth Circuit Court of Appeals. It, however, followed the decision of the Second Circuit Court of Appeals in the *General Motors case* referred to above, and affirmed the order of the Commission in full. We submit that the questions involved are substantial and that the foregoing petition for a writ of certiorari should be granted.

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## CITATIONS


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*Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304 — 11

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*General Motors Corporation* v. *Federal Trade Commission*, 114 F. (2d) 33, certiorari denied January 20, 1941 (No. 619, October Term, 1940) — 4, 12, 13

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414986—41——1

# In the Supreme Court of the United States

OCTOBER TERM, 1941

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No. 580

FORD MOTOR COMPANY, PETITIONER

*v.*

FEDERAL TRADE COMMISSION

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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### OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 404) is reported in 120 F. (2d) 175.

### JURISDICTION

The decree of the Circuit Court of Appeals was entered June 5, 1941 (R. 403), and petition for rehearing was denied June 25, 1941 (R. 433). Petition for a writ of certiorari was filed on Sep-

tember 3, 1941. The jurisdiction of this Court is invoked under section 5 of the Federal Trade Commission Act, 38 Stat. 719, 15 U. S. C. 45, and section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

### QUESTIONS PRESENTED

1. Whether petitioner, which sold its cars in interstate commerce to dealers for resale by them to retail purchasers, was using methods of competition "in" interstate commerce when it promoted sales by dealers and its own sales to dealers by representations concerning a finance plan offered to retail purchasers of its cars.

2. Whether petitioner's representations concerning a finance plan for the retail purchase of its cars constitute "unfair" methods of competition.

3. Whether the prohibitions of the Commission's order are broader than reasonably necessary.

### STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, 15 U. S. C., sec. 45, provides in part as follows:[1]

> That unfair methods of competition in commerce are hereby declared unlawful.

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[1] The Commission instituted this proceeding before, but concluded it after, section 5 was amended by the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C., Supp. V, sec. 45. The amendments are not pertinent to the questions presented in this case.

> The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Section 4 of the Act, 38 Stat. 719, 15 U. S. C. sec. 44, provides in part as follows:

> "Commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

## STATEMENT

This case involves the validity of an order of the Federal Trade Commission entered in a proceeding under section 5 of the Federal Trade Commission Act directing petitioner to cease and desist from making certain representations which the Commission found to be misleading concerning a plan for financing retail purchases of petitioner's cars.[2]

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[2] The Commission issued its complaint against both petitioner and the Universal Credit Corporation but prior to the taking of testimony the latter executed an agreement to cease and desist from the practices complained of and the Commission thereupon dismissed the complaint as to this corporation (R. 56).

The manner in which petitioner sells and distributes its cars, the character of the representations which it made, and the order entered by the Commission are precisely the same as in the case of *General Motors Corporation* v. *Federal Trade Commission,* 114 F. (2d) 33 (C. C. A. 2nd, 1940), in which this Court denied certiorari on January 20, 1941 (No. 619, October Term, 1940). Some of the questions presented in the instant case, however, were not presented by the petition for certiorari in the *General Motors* case.

The Commission based its order on detailed findings of fact which may be summarized as follows:

Petitioner, which manufactures automobiles at Dearborn, Michigan, sells its cars to several thousand dealers located throughout the United States, who in turn sell to retail purchasers (R. 47–48). The relationship between petitioner and its dealers is established by contract, which provides that the dealer shall buy petitioner's cars at the prices fixed by it, that he shall sell such cars in the manner specified by petitioner, and that he shall operate the dealership as outlined in the contract (R. 48). Petitioner assists and promotes the sale of its cars by its dealers by wide and extensive advertising, and in other ways (*ibid.*).

The sole business of Universal Credit Corporation, which petitioner organized in 1928, consists in financing the purchase of Ford cars by petitioner's dealers and the purchase of cars by retail

customers of these dealers (R. 49). When a retail customer buys a Ford car and does not pay the full purchase price, he contracts with the dealer to pay the balance due in monthly installments, usually 12, 18, or 24 (*ibid.*). If the contract is satisfactory to Universal Credit Corporation it will, under its arrangement with petitioner, buy the contract from the dealer if the dealer so desires (*ibid.*).

What is commonly known in the automobile industry as the "six percent plan" for financing retail purchases of automobiles was first announced by General Motors Corporation in advertisements published on October 21, 1935 (R. 50). Under this plan the amount paid by the purchaser is determined by adding the unpaid balance of the purchase price at the time of purchase and the cost of insurance and multiplying the sum of these two items by one-half of one percent a month for the number of months during which payment is to be made, and the purchaser pays the total amount thus determined in equal monthly installments (R. 50–51, 57).

Following the announcement of October 21, 1935, General Motors published many thousands of advertisements featuring this "6%" plan (R. 51). In order to meet the selling advantage which General Motors gained from this plan, petitioner and all the other leading automobile manufacturers announced similar plans (R. 51–52). All of these plans were computed in approximately the same

way as General Motors' plan and all of them featured the symbol "6%" or the words "six percent" (R. 52).

Petitioner announced its plan in a full-page advertisement appearing in Sunday newspapers throughout the country on January 5, 1936, and carrying the following heading (R. 53):

FORD
ANNOUNCES $25-A-MONTH
TIME PAYMENTS
AND A
NEW UCC 6% FINANCE PLAN

The advertisement described the finance charge payable by the purchaser as follows (*ibid.*):

> Your cost for this extension of credit is only one-half of 1 percent a month on your original unpaid balance and insurance. This plan reduces financing charges for twelve months to 6 percent. For example, if you owe a balance of $400 for your car and insurance, you pay $24 for the year of credit; if the balance is $200 you pay $12. Your credit cost for one year is the original unpaid balance multiplied by 6 percent.

During the first half of 1936 petitioner published and paid for many similar advertisements and it also inserted many similar advertisements which were paid for from a fund which petitioner had collected from its dealers by levying a fixed charge for advertising on each car sold (R. 54). Some of these advertisements contained an explanatory

statement like that quoted above, but others merely referred to the "6%" plan in the manner set forth in the margin [3] (R. 54; 29, 34–35).

Under petitioner's plan the purchaser pays 6%, 9%, or 12% (depending upon the number of his monthly payments) upon the amount of his original obligation although such obligation does not remain outstanding during the period of the contract but is reduced by each monthly payment, and the financing charge actually paid by the purchaser amounts to interest at about 11½% per annum upon the declining balance of his indebtedness (R. 57, 59).

Petitioner's advertising tended to mislead and did mislead a substantial part of the purchasing public into the erroneous belief that the plan contemplates a simple interest charge of 6% per annum upon the deferred and unpaid balance of the indebtedness (R. 59). It caused and intended to cause the public to buy petitioner's cars because of this erroneous belief (R. 58–59).

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[3] "Ask your Ford dealers about the new $25-a-month new UCC 6% finance plan."

"6% Plan of Financing. Total cost of credit is only ½% monthly on orginal unpaid balance and insurance (6% for 12 months)."

"$25 a month buys any model 1936 Ford V-8. Usual low down-payment ½% per month, or 6% per year, includes insurance. Ask any Ford dealer about the Universal Credit Company $25-a-month 6% Finance Plans.

$25 a month with the usual low down-payment buys any new Ford V-8 car on new U. C. C. ½% per month finance plans."

There is a regular flow of commerce in cars manufactured by petitioner from Dearborn, Michigan, to retail purchasers in other states and petitioner's advertisement and the use of the "6%" plan furthered this interstate movement (R. 58). Petitioner's practices unfairly divert trade from competitors who do not misrepresent the cost of purchasing cars on the installment or deferred-payment basis (R. 59).

The Commission at the time it issued its complaint against petitioner issued like complaints against all the other automobile manufacturers who were advertising a "6%" plan (R. 55). All the others, with the exception of General Motors, agreed to cease and desist from the practices of which the Commission complained (*ibid.*).

Upon the basis of the foregoing findings, the Commission issued an order directing petitioner to cease and desist, in connection with the interstate sale and distribution of motor vehicles, from using the words "six per cent" or the symbol "6%" in connection with the cost of any plan for financing the purchase of cars on a deferred-payment basis, when the financing charge paid by the purchaser exceeds "simple interest at the rate of 6% per annum * * * calculated on the basis of the unpaid balance due as diminished after crediting installments as paid" (R. 60).

The Circuit Court of Appeals affirmed the Commission's order. It held that the Commission's

findings were "supported by substantial evidence" (R. 418), that petitioner's representations constituted "unfair" methods of competition (R. 413–415), that they were unfair methods of competition "in" interstate commerce (R. 416–418), and that the Commission's order was not unduly broad in scope (R. 418).

**ARGUMENT**

1. Petitioner, relying upon *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U. S. 349, urges that its representations do not constitute methods of competition "in [interstate] commerce." Its contention is grounded upon the theory that (1) petitioner's only interstate commerce is its sales to its retail dealers; (2) its dealers resell only in intrastate commerce; (3) the finance plan relates only to retail purchases from the dealers; and (4) therefore, the plan is related not to its own interstate sales but only to the intrastate sales by its dealers. The *Bunte Bros.* case, however, falls far short of sustaining this theory, and is irrelevant. In that case, the Commission sought to assert jurisdiction on the ground that the unfair competitive methods alleged to have been used, though relating solely to sales of products in the state where they were manufactured, nevertheless came within the prohibtions of the Federal Trade Commission Act since they adversely affected the interstate sales of other concerns selling in that

state. But in the instant case, it is undisputed that petitioner sells its cars in interstate commerce in competition with other manufacturers. It is also undisputed that petitioner's interstate sales to dealers are the product of, and measured by, dealer resales to the public. Accordingly, in sharp contrast to the *Bunte* case, here petitioner's unfair methods were used not to promote sales solely within the state of manufacture but to promote its own interstate sales, which, in turn, were in competition with the interstate sales of other manufacturers.[4]

Petitioner's contention that because its only interstate sales are to dealers and because its methods of competition related only to intrastate retail purchases, petitioner was not within the prohibitions of the Federal Trade Commission Act, is foreclosed

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[4] Petitioner's own statement of the facts shows that representations concerning the cost of financing retail purchases have a potent and immediate effect upon the interstate competition of automobile manufacturers. The petition for certiorari (pp. 5–6) states that the various manufacturers that adopted the "6%" financing plan following its original announcement by General Motors "did so *to meet the competition created by the beneficial features of the plan* * * * and because retail purchasers were requesting dealers for something equally as good." Petitioner's general sales manager (R. 69), testifying concerning the reasons for petitioner's adoption of the "6%" plan, stated that "it would have been rather difficult to sell Ford cars through our dealers to the public without a similar plan" (R. 103–104).

by *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483, and *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304.[5] In both these cases the interstate sales were to retailers only and the unfair methods of competition related only to the retailers' resales to consumers.[6] In the *Winsted* case, the Court, in holding that the respondent's misrepresentations were subject to the prohibitions of the Act, said (p. 494):

> The honest manufacturer's business may suffer, not merely through a competitor's deceiving his direct customer, the retailer, but also through the competitor's putting into the hands of the retailer an unlawful instrument, which enables the retailer to increase his own sales of the dishonest goods,

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[5] Petitioner seeks to distinguish the *Keppel case* on the ground that there the machinery for effecting the unfair competition was a part of the interstate shipment. This circumstance was not a factor significant to the decision. While there must be competition in interstate commerce promoted by unfair means, the unfair means need not be the subject of an interstate transaction. Nor would a different view of the statute aid petitioner. It published its misleading representations in newspapers throughout the country and therefore gave them an interstate circulation. Petitioner's action was the same, in substance, as if it had prepared a placard setting forth its representations concerning the "6%" finance plan and had attached this placard to each car shipped to its dealers, for display by them to prospective customers.

[6] See *Keppel & Bro., Inc.* v. *Federal Trade Commission*, 63 F. (2d) 81, 84 (C. C. A. 3); *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483, 490, 494.

thereby lessening the market for the honest product.

The facts of the present case bring it even more squarely within the ban of the statute since petitioner did not merely put into the hands of its dealers an "unlawful instrument" but itself employed such instrument.[7]

2. Petitioner contends that its representations concerning the "6%" plan were not "unfair" methods of competition. This contention is grounded for the most part upon the same argument advanced in the petition for certiorari in the *General Motors* case (No. 619, October Term, 1940), namely, that the representations were not inherently false and would not deceive an intelligent or inquiring purchaser.

It is unnecessary to repeat in full the Government's argument in its brief in opposition (pp. 14–17) in the *General Motors* case. We call attention, however, to the statement in *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 81, that the test to be applied in determining whether a representation is unfair under the

[7] Deceptive representation concerning the price of a product is as much an "unlawful instrument" of competition as deceptive representation concerning its nature. When a product is usually sold on credit, misrepresentation concerning the cost of the credit extended to the purchaser is the equivalent of a misrepresentation concerning purchase price.

Trade Commission Act is its "capacity to deceive," not whether it constitutes "fraud as understood in courts of law," and to the holding in *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112, 116, that the prohibition against unfair methods of competition includes those which avail to capture the trade of only the ignorant or gullible.

Petitioner appears also to urge that the Commission's findings as to the deceptive effect of petitioner's representations are not supported by evidence. We submit that there is, as found by the court below (R. 418), substantial evidence in support of the findings.[8] Petitioner relies upon evidence, absent in the *General Motors* case, that two governmental agencies, the Federal Housing Administration and the Electric Home and Farm Authority, had issued circulars using the word "interest" or "discount" in reference to finance plans computed in substantially the same way as petitioner's. But such evidence did not compel a different conclusion, from that reached by the Commission, and the weight to be accorded to it, as to all the other evidence in the case, is for the Commission to determine.

3. Petitioner contends that the prohibitions of the Commission's order go beyond the charge made in the complaint. The facts appear to furnish no

[8] R. 229, 245–246, 262–263, 302–303, 312, 316–318, 347–348, 374.

basis for this contention. The complaint charges that the symbol "6%" which petitioner stressed in its advertising misled purchasers into the erroneous belief that the financing charge was interest at 6% per annum on the declining balance of their obligation (R. 30). The order prohibits use of this symbol or the words "six percent" in connection with any plan for financing retail purchases of automobiles if the financing charge in fact exceeds interest at 6% per annum calculated on the declining balance of the purchaser's obligation.

Petitioner also urges that the order, instead of prohibiting use of the 6% symbol in the foregoing manner, should have merely prohibited such use when not accompanied by explanatory language. Where it is shown that outright prohibition of words having deceptive effect would require abandonment of a trade name having valuable good will, its continuation, accompanied by qualifying words sufficiently preventing deception, will sometimes be permitted. *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, 217–218. But in the instant case there was no showing of exceptional circumstances warranting such a modification in the Commission's order.

## CONCLUSION

The decision below is clearly correct. It presents no conflict and no unsettled question of statutory interpretation. It is therefore respectfully

submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941